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Davis on Administrative Law: The Treatise and the Casebook

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DAVIS ON ADMINISTRATIVE LAW: THE TREATISE AND THE CASEBOOK*

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PROFESSOR DAVIS' treatise on administrative law, which is in many ways a pioneering book, probably sets the pattern for comprehensive works in this subject during the quarter-century now beginning; and a fortunate pattern it is. The emphasis in the Anglo-American literature of administrative law has shifted since the subject came prominently to the attention of legal scholars around 1890, from discovery to controversy and again to critical exposition of the procedures of agencies and of the work of the courts in judicial review of agency determinations. The Davis volume follows the third pattern and is the first comprehensive work in book form to do so.

Because of the variety, complexity, and fluidity of administrative law, dealing as it does with numerous agencies established by varying statutes in many jurisdictions, no comprehensive work coming measurably close to meeting the needs of the legal profession had previously appeared in this country.[1] There was danger that, when one did, it might take the form of a bulky, unrealistic stringing-together of judicial utterances without recognition of inner conflicts or with conscious or unconscious selection to promote a particular philosophy. That danger is now averted if, as seems likely, the Davis book meets with professional acceptance.

Some day, perhaps, a treatise on administrative law that parallels

*Administrative Law, by Kenneth Culp Davis, St. Paul, West Publishing Co., 1951, pp.xvi, 1025.

Cases on Administrative Law, by Kenneth Culp Davis, Boston, Little Brown and Company, 1951, pp. xxv, 1031.

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1. F. T. vom Baur, Federal Administrative Law (2 vols. 1942) was published before present conceptions as to administrative law were consolidated by administrative procedure legislation. Its complicated outline is difficult to follow. This difficulty is enhanced by the fact that four-fifths of the work's content is brought under the general headings, Judicial Review and Suits By and Against Administrative Agencies and Their Officers. The book makes undiscriminating use, moreover, of purportedly clear concepts which, however, conflict in confusing fashion. It appears to have been cited relatively infrequently.

James Hart, An Introduction to Administrative Law, with Selected Cases (2d ed. 1950) is intended primarily for use by students of political science but is a valuable book for lawyers too, both as an introduction to the subject and for its treatment of the law of public officers and certain aspects of "internal administration." Another useful first book is Carrow's brief Background of Administrative Law (1948).

Parker, Administrative Law (1952), which contains 293 pages of concentrated text, is the most recent addition to the library of the subject.

Wigmore on Evidence by drawing on all previous scholarship and authority and adding the judgments of a master may be produced. Professor Davis' book is not such a one; but it has some of the same qualities and it points in the direction of a work of that character. No mere hackneyed or conventional text is likely to commend itself to readers in the face of this book, pending the production of a definitive, complete work of the Wigmore type. And the Davis book will have permanent value as a text for study or for introductory reading.

The job in American administrative law that needed to be done in book form was one that, making use of an adequate body of authority and of critical judgment, would serve (1) to introduce law students to the subject, (2) to assist officials, practitioners, and judges to conform their advice, advocacy, and decisions to valid existing practice, and (3) to aid inviduals and groups to improve administrative methods through legislation or other types of action. Professor Davis' treatise serves these purposes extremely well. His casebook, in addition, offers a new tool for initiating law students into the hard work of the subject.

Because administrative law is still fluid and incapable of categorical statement in many respects, as well as still quite unfamiliar to many, the primary need has been for a book that could be read in its entirety to obtain a grasp of the subject's fundamental framework and at the same time be drawn upon for suggestive leads in the solution of problems. Professor Davis' text can be used in both ways. The book's framework is one which has come to be generally accepted in this country, but which has only recently come to be recognized. Not until the report of the Attorney General's Committee on Administrative Procedure has been rendered and recent legislation adopted would it have been possible to present such an analysis of administrative law with confidence that its basic categories possessed validity. Now it is possible, even while much detail remains debatable. The main outline, following a brief summary of the development of "the administrative process" and a review of previous literature, deals with delegation and subdelegation of powers; administrative investigation; informal administrative adjudication and other activity; rule-making; adjudication of the more formal variety, including problems of bias, separation of functions within agencies, evidence, official notice, and findings; res judicata; prerequisites to judicial review; procedures for judicial review; and scope of judicial review. These are the subjects that,

except for res judicata and prerequisites to review, are discussed in the Attorney General's Committee report, to which Davis makes frequent reference;[2] and they are covered in rudimentary fashion in the Federal Administrative Procedure Act,[3] the Model Administrative Procedure Act,[4] and parallel legislation in some of the states.[5] Previous writings in this country, even of the more comprehensive variety, had dealt with these topics only in part; and some of the topics have been recognized only recently as coming within the field of lawyers' administrative law at all.[6]

Davis deals clearly with these various topics in a text of 20 chapters and 928 pages. He brings out existing administrative practice and the state of judicial decisions on controverted points, with the addition of his own judgments and suggestions based on extend study and observation.[7] Many of his chapters were previously published as articles, which have now been brought down to date. Several of them are highly original discussions of the subjects covered and a number may justly be characterized as brilliant. Outstanding are those on Investigation, Institutional Decisions, Evidence, Official Notice, Res Judicata, Nonreviewable Action, Exhaustion of Administrative Remedies, and Scope of Review.

In his choice of authorities and subject matter Davis has largely omitted English cases, literature, and experience and has drawn sparingly on American state statutes and cases when these have

2. Professor Davis was a member of the Committee's research staff and, as such, wrote several of the monographs on particular agencies which formed the basis of the Committee's Final Report. The report was published by the Government Printing Office in 1941.

3. 60 Stat. 237 (1946), 5 U. S. C. § 1001, *et. seq.* (Supp. 1951).

4. The Model Act was drafted by the National Conference of Commissioners on Uniform State Laws and given final approval by that body in 1946. See Stason, *The Model State Administrative Procedure Act,* 33 Iowa L. Rev. 196 (1948).

5. State legislation is helpfully reviewed in Nathanson, *Recent Statutory Developments in State Administrative Law,* 33 Iowa L. Rev. 252 (1948). Heady, Administrative Procedure Legislation in the States (1952) is a significant study of the administration of these statutes in a selected group of states.

6. Freund, Administrative Powers Over Persons and Property 15 (1928) excluded the rule-making power from consideration, because it "is legislative in substance and is not necessarily part of a study of administrative powers." The importance of informal administrative methods was not generally recognized until the report of the Attorney General's Committee called attention to it.

7. In addition to his teaching since 1935, the writing of numerous articles on administrative law, and his service on the staff of the Attorney General's Committee, Professor Davis was a member of the staff of the Board of Investigation and Research, which was appointed pursuant to the Transportation Act of 1940 and in 1944 rendered a significant report on Practices and Procedures of Governmental Control, H.R. Doc. No. 678, 78th Cong., 2d Sess. (1944).

offered a significant supplement to the Federal material upon which the book mainly relies. In short, this book is designed to be a useful discussion of administrative law in this country, drawing upon the most significant and coherent body of material available, rather than a jurisprudential discussion on the one hand or a search book on the other. However, it quotes effectively and generously from court opinions and previous writings with consequent enrichment of content and enhancement of interest. Approximately 2,000 decisions are quoted from or cited, and administrative practice is drawn upon to a large extent. Interest is further enhanced, along with the utility of the book, by frequent discussion of controversial or unsolved problems. The references to authority are given added value by these discussions, which aid the reader to appraise the validity and force of existing precedents and writings.

The controversies in Anglo-American administrative law which followed the initial discovery that the subject was important[8] dealt largely with constitutional and jurisprudential issues—the validity of the bestowal of "legislative" and "judicial" powers upon administrative agencies, the consistency of administrative methods with due process of law, the relation of administrative discretion to the "rule of law," and the extent of judicial review necessary to keep administration within the bounds appropriate to our system of law. These controversies in their larger aspects have now been largely resolved, although they remain in the background of current discussion of more specific issues. Lawyers and students of government have either recognized that the separation of powers is not violated by a distribution of functions which permits all three branches of government to engage in similar operations, so long as *power* is not too concentrated,[9] or have concluded that we must live with technical violations of traditional doctrine.[10] The need for official expertness and discretion is everywhere recognized,[11] as is

8. The first influential work to call attention to English administrative law was Gneist, Englishe Verwaltungsrecht (1863), to which a number of subsequent writers have called attention. An earlier work by J. Toulmin Smith, Government by Commissions, apparently went unrecognized. See Cavers, *Book Review,* 47 Yale L. J. 675 (1938). Maitland in lectures delivered in the 1880's but not published until 1908, recognized the significant development that had taken place. Around the turn of the century, Goodnow, Freund, and others began the American literature on administrative law.

9. Fuchs, *An Approach to Administrative Law,* 18 N. C. L. Rev. 194 (1940).

10. Frequently cited is the statement of Elihu Root, which Davis quotes at p. 5, that "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight."

11. Perhaps the greatest statement in print of the growing importance of discretion comes from a frequent later critic of administrative agencies.

the fact that the professional discipline and responsibility of the expert supply many of the checks against arbitrariness which are required. Judicial review supplies an additional check which, while recognizing and deferring to expertness properly applied, may correct abuse and require that, by means of findings and other procedural devices, the processes of the expert be kept as understandable to the layman as may be. With respect to procedure in terms of fairness to interests affected, the significant issues today are quite far removed from the bare requirements of constitutional due process. They relate rather to such matters as the applicable principles of evidence, the division of functions within an agency, and the procedural rights of interests collateral to those immediately involved—often in proceedings where, because of the legislative or prerogative character of what is being done, traditional constitutional safeguards are inapplicable. Modern administrative law, far from presenting a picture of arbitrary or summary action, consists of an elaborate body of requirements and safeguards, attaching to the action of agencies in the executive branch of government, such as was undreamed of a half-century ago.. Developed originally in connection with new functions in the regulation of business, these requirements and safeguards have now been extended back to a greater or lesser extent over many of the traditional governmental functions, such as tax collection, immigration and deportation, occupational licensing, and the conduct of the post office.

Professor Davis reviews the earlier constitutional and jurisprudential issues briefly in his first chapter and one-half, covering 72 pages of text, and refers to them again in the remainder of the book as occasion requires. Following this initial summary, he proceeds to discuss the significant developments and problems of modern administrative procedure and judicial review. Early in the book Davis sketches the transition from the approach of earlier years to that of today, based on the analysis of the Attorney General's Committee on Administrative Procedure and the Benjamin Report in New York[12] and on the principles and categories embodied in the Federal Administrative Procedure Act, the Model Act, and recent state legislation.[13] Noting that "much constructive work remains to be done" in the states, Davis points out that "Federal administrative law, whose development in general is much more re-

See Pound, *The Administrative Application of Legal Standards,* 44 A.B.A. Rep. 445 (1919), reprinted, IV Selected Essays on Constitutional Law at p. 76 (1938).

12. Administrative Adjudication in the State of New York (1942).

13. Pp. 8-10.

fined than that of the states, furnishes a useful guide and much facilitates the solution of state and local problems."[14]

One of the strong points of Davis' presentation and discussion of current problems lies in its frequent use of material drawn from administrative agencies themselves. Agency rulings, decisions, annual reports, regulations, and rules of practice are drawn upon, along with statutes and judicial decisions. Matters are sometimes followed from agency to court and back again, with legislation occasionally added.[15] The result, of course, is much greater realism than could be accomplished otherwise, both because the actual results of official action are traced and because divergent points of view are reflected. Through all of this material Davis moves with a mastery of touch which discloses complete familiarity with the sources together with mature consideration of the issues discussed. The products of legal scholarship appear here at their best.

Much might be written, and doubtless will be, with regard to the soundness or unsoundness of particular conclusions Davis reaches. There would be little purpose in an appraisal of these conclusions here, since the basic value of the book does not turn upon them. Suffice it to say that Davis keeps his eye steadily on the twin objectives of effectiveness in achieving the purposes an agency is created to serve and of fairness to the persons and interests upon which the agency's work impinges.[16] To this reviewer his judgments, with rare exceptions,[17] seem sound, and such acceptance

14. P. 10.

15. Illustrative are the account of a development in Interstate Commerce Commission practice with regard to official notice, at pp. 505-508; the controversy over the action of the Securities and Exchange Commission in Federal Water Service Corp., at pp. 552-560; and the history of the Immigration and Naturalization Service's methods of conducting hearings, at pp. 306-308, 446.

16. Disavowal of concern with the wisdom of conferring administrative powers is frequent in the literature dealing with administrative law. Much of the literature gives the impression, nevertheless, of being motivated by bitter opposition to such powers or by ardent support of the policies of governmental regulation.

17. Occasionally Davis is moved by concern with a particular problem to endeavor to work out a detailed solution for consideration by agency authorities. Outstanding among such attempts is that which is embodied in his discussion of supervision of radio programs by the Federal Communication Commission, at pp. 138-149. It may be doubted whether this problem merits such detailed consideration in a general work. Davis's proposal that the Commission assume power, which has not been conferred by statute, to issue orders with respect to specific practices by using the device of declaratory orders under the Administrative Procedure Act seems highly questionable. Nevertheless, Davis's discussion is illustrative of the objectivity of his approach; for he evidences equal concern with effective exercise of the Commission's powers and with the right of station operators to know the rules under which they must work.

as they may receive will contribute to the wise solution of the numerous problems dealt with. Surely it would be difficult to deal more justly than Davis does with the power of agencies to compel the disclosure of information,[18] with the power to advise, supervise, and adjudicate informally,[19] with separation of functions,[20] with evidence[21] and official notice,[22] and with res judicata.[23]

A major value of the Davis treatise lies in its disclosure of the extent of the confusion and inconsistency in the authority on many problems. For example, subdelegation of their power by administrative officers,[24] the effect of interpretative and so-called legislative regulations,[25] the requirements as to personal participation by deciding officers in "institutional," or cooperative, decisions,[26] and the requirement of findings to accompany decisions[27] are shown to have been subjected to such inconsistent doctrines and points of view by legislation, administrative practice, or judicial decision as to require any lawyer dealing with these topics to discard the thought of relying on mere precedent as a guide. Here, of course, is where Davis' method of critical discussion possesses especial value because its suggestion of pertinent considerations on the merits, whether or not Davis' conclusions are accepted.

The casebook embodies an approach adapted to the problem-filled nature of its subject. It is constructed on the premise applicable to legal education generally but especially appropriate here, that "the primary need of law students . . . is ability to grapple with problems." To develope that ability, real problems "along the frontier of the subject," rather than artificial ones for which answers have in reality been accepted, should be presented to the student after he has mastered the pertinent material so far as possible.[28] Because it runs parallel to the textbook, with the same chapter heading and a selection of the same topics, Davis' casebook is relieved of the burden ordinarily borne by teaching material of rounding out the subject or providing references for further study; for the text, of course, is available for these purposes. Accordingly the casebook, containing 1004 pages of material, con-

18. Pp. 115-136.
19. Ch. 4.
20. § 139.
21. § 149.
22. § 157.
23. § 172.
24. Pp. 73-82.
25. Ch. 5.
26. Ch. 8.
27. Ch. 13.
28. Preface, p. v.

sists mainly of contemporary statutes, rules, decisions, quotations, and original text which serve to point up numerous significant problems of administrative procedures and judicial review. Many of these problems are left to inference, residing, as the editor says, in a "dissenting opinion, the vulnerable view of a lower court, the inconsistencies between cases, the uninterpreted statute," or "the unsatisfactory features of established law."[29] Other problems are stated in question form, in Notes and Problems passages interspersed throughout the material.

The opening chapter, dealing with the administrative process generally, contains thumbnail sketches, historical and cross-sectional of the principal Federal regulatory commissions, together with brief discussions of the relative merits of judicial and administrative enforcement of workmen's compensation laws, an account of how the Antitrust Division of the Department of Justice works through litigation, and a selection of quotations with regards to some of the controversial aspects of administrative law. The later material is enlivened and given enhanced value by the inclusion of passages from congressional committee hearings in which administrative practices have been called in question, as well as quotations from agency memoranda and other material which contain rather striking disclosures. All in all, as might be expected from a reading of the Davis textbook, the casebook based upon it contains a stimulating body of significant material. It is highly "teachable" and affords a basis for students to become equipped to deal with the really important problems in the field.

Unlike the text, the casebook is not without meritorious predecessors which may be used to serve the same ends. At least four others have been published since the passage of the Federal Administrative Procedure Act and, consequently, take account of the same fundamental conceptions and developments as underlie the Davis book.[30] All of them are good books which a competent teacher can supplement and adapt to the particular purposes he chooses to pursue. For many, Davis requires supplementing in respect to history and theory and, of course, in respect to local material if emphasis is to be placed on a particular state jurisdiction. In the

29. *Ibid.*

30. Published in 1947, the four books are: Gellhorn, Administrative Law, Cases and Comments (2d ed.); Katz, Cases and Materials on Administrative Law; McFarland and Vanderbilt, Cases and Materials on Administrative Law; and Stason, The Law of Administrative Tribunals (2d ed.). A second edition of the McFarland and Vanderbilt book has been published in 1952.

latter respect it does not differ from other books, despite the greater use which some of them make of state cases, since adequate concentration on the law of a single state cannot be had without reproducing a body of material from that jurisdiction.

On the historical side, one regrets the absence of a more comprehensive survey of the rise of administrative agencies, which, however, is easily available elsewhere and is supplied to some extent in the Davis text. Also missing is the historical development of judicial conceptions relating to delegation of legislative power. Bestowal of judicial power on administrative agencies, which is covered briefly in the text,[31] is passed over here with brief mention. And Davis chooses not to include any analysis of the various types of discretion, such as Freund has supplied[32] and such as underlies, for some, the understanding of administrative powers. Instead, he stimulates many realistic insights into, for example, the interaction of legislature and agency in working out standards to deal with new and untried problems[33] and the fluctuations of agency policies in matters which are subject to broad discretion.[34] The values which are served in this way stand higher in the scale than the more historical and philosophical ones; and if there must be sacrifice of one or the other, Professor Davis has chosen wisely. By means of his casebook he has placed in the hands of law teachers a potent means of training future lawyers to practice effectively—with sophistication and with devotion to social ends.

Sophistication and dedication to fundamental values are, indeed, outstanding characteristics of both of Davis' books. Without smartness on the one hand or pontifical utterance on the other, the author and editor handles down-to-earth matters with manifest high purpose. One likes to think that such products of modern American legal thinking and research are indicative of what will be achieved increasingly as legal education moves farther along the path it started to travel in the early 1920's.[35]

31. § 18.
32. Freund, Administrative Powers Over Persons and Property, Ch. VI (1928).
33. Pp. 105-113.
34. Pp. 206-233, 590-632.
35. Professor Brainerd Currie has started to tell the story of this development. See 3 Journal of Legal Education 331 (1951).